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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL DEUSCHEL, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent.	B269341 (Los Angeles County Super. Ct. No. NC055567)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Michael Deuschel, pro. per., for Plaintiff and Appellant.

Howard D. Russell, Deputy City Attorney, City of Long Beach, for Defendant and Respondent.

Michael Deuschel sued the City of Long Beach, asserting that his vehicle had been illegally towed, stored, and ultimately sold at auction. After Deuschel presented his case to the jury, the trial court granted the City of Long Beach's motion for non-suit and entered judgment. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Michael Deuschel (Deuschel) parked his vehicle near his home in November 2009; the City of Long Beach (City) ticketed and towed it. Deuschel challenged both the ticket and the legality of the towing and subsequent storage. When he failed to get relief from City, his vehicle was sold at auction. He sued the City.

Deuschel commenced his lawsuit in January 2011. After City answered, the court set the case for trial in February 2012. In January 2012, Deuschel moved for a continuance, citing health issues; City stipulated to his request and the trial court continued the trial date to April 2012. In March 2012, Deuschel filed an ex parte application to continue the trial again, based on his medical needs, requesting a trial date after May 12, 2012. The trial court set a new trial date of May 14, 2012.

In April 2012, Deuschel sought leave to file a First Amended Complaint, alleging a single cause of action for violation of Title 42 United States Code section 1983. In May, Deuschel filed another ex parte motion to continue the trial to September, again citing his medical condition; the trial court granted leave to amend and continued the trial to January 2013.

That January, Deuschel's counsel sought to withdraw from representation and to continue the trial; after counsel withdrew the request, the court continued the trial until February. In

February, Deuschel sent a letter to the court requesting another medical continuance until June; the court continued the trial to August. Deuschel substituted in new counsel in June. In August, counsel filed an ex parte application to continue the trial until December 2013, because Deuschel had surgery scheduled; the court continued the trial, with counsel's consent, to January, 2014. Deuschel brought in another new counsel in January, and the court continued the trial to September 2014.

In July 2014, Deuschel moved to re-open discovery, asserting that his prior counsel had failed to conduct discovery; the record demonstrates no discovery by Deuschel prior to this motion. The trial court denied the motion. The case was then transferred to another courtroom, and all dates were vacated; the trial was later reset for December 2014.

In October, then current counsel filed a motion to withdraw; the court set the motion for hearing on December 5, and vacated all other dates. Deuschel opposed the motion, and asserted that any further continuance would interfere with his on-going medical treatment. The trial court denied the motion and reset the trial date for December. City's motion to continue the trial to January 2015 was then granted.

On January 7, 2015, Deuschel delivered an ex parte letter to the trial court, which he characterized in his briefing to this Court as a request for accommodation of his disability. The trial court ordered the document sealed, unread.[1]

At the Final Status Conference, Deuschel reported that he had surgery scheduled, and the court continued the trial to April 2015. The parties later stipulated to continue the trial until

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[1] Pursuant to Deuschel's request, this Court has reviewed the letter. It will be discussed below.

August 2015, to allow Deuschel time to recover. Deuschel's counsel sought, and was granted, leave to withdraw in April; Deuschel substituted in new counsel in August. The parties stipulated to trail the trial from August 7 to August 18. After pre-trial proceedings, the parties picked a jury, and Deuschel testified. The trial court granted City's motion for non-suit (Code of Civ. Proc., § 581c)[2] on August 19, 2015, and entered judgment in October. Deuschel appealed.

DISCUSSION

On appeal, Deuschel raises a number of arguments. We will address those arguments concerning pre-trial and trial error: specifically, the court's denial of the motion to re-open discovery; the court's grant of motions in limine; and the court's grant of the City's non-suit motion. We will also discuss the court's treatment of Deuschel's requests to continue the trial. We cannot, however, address the significant arguments that counsel was ineffective, biased, or negligent in the performance of their professional duties, as those matters are not before this Court on the appeal of the judgment in this matter; the concerns appellant expresses concerning the inadequacy of his medical treatment are also not matters before this court.[3]

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2 Further statutory references, unless otherwise noted, are to the Code of Civil Procedure.

3 The record does not indicate whether Deuschel has filed any proceedings or claims in any forum against any of his counsel.

A. The Trial Court Did Not Abuse Its Discretion In Denying The Motion To Re-open Discovery

In January 2014, new counsel appeared for Deuschel. In March, that counsel requested that City stipulate to reopen discovery in the matter. The City declined to stipulate, and Deuschel filed a motion to reopen, citing section 2024.050. In that motion, Deuschel explained that he did not know why previous counsel had not conducted discovery. Although the trial date, at the time of the motion, was September 2014, Deuschel also requested a continuance of the trial.

The trial court, in denying the motion, discussed the procedural history of the case, including the number of continuances, transfers of proceedings, and substitution of counsel. The court found no good cause to grant the motion, concluding that there had been no bar to conducting discovery previously, and that reopening discovery after the case had been pending for more than three years would prejudice City.

We review the denial of a motion to reopen discovery for abuse of discretion. (§ 2024.050; *Roe v. Superior Court* (1990) 224 Cal.App.3d 642, 646, fn. 5.) An order denying a motion to reopen discovery cannot be reversed absent a clear abuse of discretion. (*Ibid.*) (See also *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal.App.4th 1568, 1588 ["under section 2024.050, subdivision (b), the trial court's discretion to grant such a motion was not unfettered, but could be exercised only upon 'tak[ing] into consideration any matter relevant to the leave requested,' including, but not limited to ... [¶] '[t]he necessity and the reasons for the discovery' and '[t]he diligence or lack of diligence of the party seeking ... the hearing of

a discovery motion, and the reasons that ... the discovery motion was not heard earlier.'"].)

We cannot conclude, on this record, that the trial court abused its discretion. Deuschel was unable to explain why, in the more than three years that the case had been pending, he had taken no discovery. He also did not explain why a motion to reopen had not been made at the time of any of the previous continuances. Finally, appellant made no attempt to respond to the claim of prejudice asserted by City.

B. The Trial Court Did Not Abuse Its Discretion In Granting The Motions in Limine

1. City's Motions

City filed a motion in limine to exclude evidence of the administrative hearing at which the hearing officer determined that the parking citation and related tow of appellant's vehicle was improper. City argued that the evidence was irrelevant, but, even if it had some marginal relevance to the issues before the jury, it should be excluded under Evidence Code section 352. The City also sought to bifurcate damages from liability.

The trial court granted the request to bifurcate. With respect to the motion in limine, Deuschel's counsel stated that he did not intend to tender evidence concerning the administrative hearing unless the City adduced evidence of the underlying ticket. City acknowledged it did not intend to mention the ticket. The court precluded introduction of the evidence presented at the administrative hearing and the results; Deuschel did not object.

Prior to jury selection, City objected to admission of evidence on a theory of failure to train, arguing that the pleadings provided no notice of that theory of municipal liability.

The court asked Deuschel's counsel for an offer of proof, and counsel responded that Deuschel would testify that he had been told by two City employees that Maggie Everett, the employee responsible for post-storage hearings, "does it however she wants." Counsel argued that testimony demonstrated a failure to train Everett concerning the requirements of due process. The court, finding that such testimony was hearsay and insufficiently related to the issues, precluded the testimony.

2. Applicable Law

We generally review the trial court's rulings on motions in limine for abuse of discretion. (*Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 336; *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392.)

The single cause of action in this case, a claim that City violated Deuschel's rights, asserts a violation of Title 42 United States Code section 1983. To establish municipal liability under this statute, Deuschel was required to prove that City adopted a policy, ordinance or regulation that caused the harm alleged. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 691.) As the United States Supreme Court has explained, "*Monell* is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape* 365 U.S. 167 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the

doctrine of *respondeat superior*. See *Monell,* 436 U.S., at 691." (*Pembaur v. City of Cincinnati* (1986) 475 U.S. 469, 477-478.)

The requirement that a plaintiff demonstrate an official policy "was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." (*Pembaur, supra,* 475 U.S. at pp. 479-480.)

The fact that an act or decision was taken by an officer of the municipality is not enough to establish municipal liability. Even where the official has, and exercises, his or her discretion in undertaking a function, this alone is insufficient to create municipal liability. (See, e.g., *Oklahoma City v. Tuttle* (1985) 471 U.S. 808, 822–824.)

Where, as here, a plaintiff seeks to impose municipal liability on the basis of a failure to train municipal employees, he or she must prove "that (1) he was deprived of a constitutional right, (2) the City had a training policy that 'amounts to deliberate indifference to the [constitutional] rights of the persons' with whom [its police officers] are likely to come into contact'; and (3) his constitutional injury would have been avoided had the City properly trained those officers. See [*Lee v. City of Los Angeles* (9th Cir. 1989) 250 F.3d 668], 681 (quoting *City of Canton v. Harris* (1989) 489 U.S. 378, 388–389)." (*Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 484.)

3. The Proffered Evidence Was Insufficient

Deuschel's offer of proof with respect to City employee Maggie Everett did not demonstrate that he could provide evidence to satisfy the legal standard. Her ability to exercise discretion, without the showing of a training policy demonstrating "deliberate indifference," and without a suggestion of training that could have avoided the injury, is insufficient to establish liability. (*Lee, supra,* 250 F.3d at p. 681 ["a plaintiff must show that his or her constitutional 'injury would have been avoided' had the governmental entity properly trained its employees. [Citations]"].)

Accordingly, the trial court did not abuse its discretion in granting the remaining motion in limine.

C. The Record Supports the Grant of Non-Suit

1. Deuschel's Evidence At Trial

Deuschel was the sole witness at trial. He testified that, in November 2009, he resided in Long Beach. On November 24, he parked his vehicle on the street; other cars were also parked there, and he did not observe any no parking signs. At 7 a.m. on November 25, his car, along with others, was still parked on the street; later that morning, his car was gone, and City workers were present. Those workers told him his vehicle had been towed.

Deuschel then went to City Hall, where he was directed to the Mayor's office; the Mayor's staff directed him to speak to Maggie Everett at the Police Department. He asked that his truck be returned, to which Everett responded "That's not going to happen. I've already made up my mind." Deuschel asked her to review a witness statement and to allow him to bring in

additional statements, asking for a hearing; she responded that "she had already made up her mind."

On December 6 or 7, Deuschel received a post-storage hearing notice from City, a copy of which was admitted at trial as the only exhibit offered. [4] Deuschel went to the City impound yard, where he was directed to return to the Police Department. At the Department, Deuschel spoke to Sargeant Conline, Everett's supervisor, requesting a post-tow hearing; Conline told Deuschel he had already had a hearing with Everett. Deuschel asked for an opportunity to provide evidence, and Conline asked for that evidence, but Deuschel did not have it available at that meeting. Following that meeting, Deuschel did not recover his vehicle; the City auctioned it.

After the conclusion of his testimony, Deuschel rested; City moved for nonsuit on the grounds that there was no evidence to support municipal liability. (§ 581c [trial court may enter judgment after the plaintiff has completed his or her opening statement or the presentation of his or her evidence].)

2. The Trial Court Did Not Err

"We independently review an order granting a nonsuit, evaluating the evidence in the light most favorable to the plaintiff and resolving all presumptions, inferences and doubts in his or her favor. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838–839, 206 Cal.Rptr. 136, 686 P.2d 656; *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895, 102 Cal.Rptr.2d 502; see generally *People v. Ault* (2004) 33 Cal.4th 1250, 1266, 17

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[4] At oral argument, Deuschel argued that the notice itself, because it directed him to a non-existent location, demonstrated an official policy to deny a hearing. The notice, however, directed him to the Police Department.

Cal.Rptr.3d 302, 95 P.3d 523 ['[A]ppellate review of trial court orders granting nonsuits, directed verdicts, or judgments notwithstanding the verdict—orders that finally terminate claims or lawsuits—is quite strict. All inferences and presumptions are against such orders.'].) 'Although a judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is "some substance to plaintiff's evidence upon which reasonable minds could differ. . . ."' (*Carson,* at p. 839.) In other words, '[i]f there is substantial evidence to support [the plaintiff]'s claim, *and* the state of the law also supports that claim, we must reverse the judgment.' (*Margolin,* at p. 895.)" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124–1125.)

A trial court properly grants a motion for nonsuit where, as a matter of law, the evidence is not sufficient to support a jury finding in the plaintiff's favor. The trial court, in making its ruling, may not make credibility determinations or weigh the evidence; instead it must interpret all evidence in the light most favorable to the plaintiff. (*Allgoewer v. City of Tracy* (2012) 207 Cal.App.4th 755, 761 [motion for nonsuit raises issue of law; considering all evidence in plaintiff's favor, defendant is entitled to judgment if there is not substantial evidence to support claim]; *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [same].)

Here, in granting the motion, the trial court concluded that, even completely crediting all of Deuschel's testimony, there was no evidence of an official pattern, custom, policy or practice to deny a hearing. The trial court further reasoned that even if there were such a policy, there was no evidence that any official

policy maker sanctioned the denial of the hearing. The court did not err in this conclusion. While the evidence in this case demonstrates an unfortunate series of events, that evidence does not establish a violation of section 1983, the only claim remaining in the case at the time of trial. Neither Deuschel's testimony nor his exhibit demonstrated the existence of any City policy to deny a hearing; moreover, he did not demonstrate either a lack of training, or suggest training that would have avoided the injury he claims. The record here shows no "substance to plaintiff's evidence upon which reasonable minds could differ."

D. The Trial Court Did Not Abuse Its Discretion In Responding to Deuschel's Medical Needs

Deuschel asserts that the trial court abused its discretion in denying his requests for accommodation of his disability, and in failing to grant his requests under the Americans With Disabilities Act of 1990 (42 U.S.C., § 12101 et. seq.) (ADA).

California Rules of Court, rule 1.100 (b) provides that "It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system." The Rule requires that a request for accommodation must describe the accommodation being sought, and the medical condition on which it is based. Requests must be made in advance, no fewer than five court days before the relevant date, although the court has discretion to waive this requirement. (Rule 1.100 (c)(2), (3).) As Deuschel correctly asserts, an accommodation may be a trial continuance; "the cost to the public of multiple continuances[ ]must be accepted under certain circumstances as necessary for effective access to judicial services

for disabled persons." (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1275.)

In this case, the trial court granted multiple trial continuances. The record demonstrates that, given multiple changes of representation, and multiple transfers of courtrooms, every request for continuance was granted, with the length of the extension equal to or greater than the time requested. The only exception was the final trial setting; in that case, Deuschel's physician, in February, estimated a six-month recovery period ending August 24; the trial took place six days prior to the end of that period, a date to which Deuschel's counsel stipulated.

Deuschel asserts that the trial court improperly ignored a request for accommodation which he filed, ex parte, directly with the trial department in January 2015, eight months before the trial. At his request, we have reviewed the letter.[5] While it does describe medical conditions justifying a continuance, it also raises many issues unrelated to any request for accommodation. The letter was not presented in compliance with Rule 1.100, which requires filing through the ADA coordinator. In any event, the trial court did not order Deuschel to commence trial within the period discussed in the letter. Deuschel has failed to demonstrate any violation of the ADA or Rule 1.100.

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[5] During the course of this appeal, Deuschel filed a number of motions with this court. The motions to take judicial notice dated January 25, 2018, February 8, 2018, and June 26, 2018 are denied, as the matter contained in the requests is not proper for judicial notice. (Evid. Code, §§ 451, 453.)

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.